

## INTRODUCTION

Sport has long occupied a special place in society but a complicated one in law.

The statement will be addressed in two sections. First, it will be argued that sports is inextricably intertwined with human rights, and as such there is a need for a human rights component of sports governance, which can best be fulfilled by conceptualising the European Court of Human Rights ('ECtHR') as being part of sports governance (**Section I**). The ECtHR sports-related case law will then be evaluated to determine how successfully the ECtHR has performed its role in safeguarding human rights in sports governance, disputing that the ECtHR has interfered substantively with competition rules or sports regulations and positing that continued safeguarding of our human rights by the ECtHR would be beneficial to sports governance (**Section II**).

## SECTION I

In its fifty-seven pages, the European Convention of Human Rights (ECHR) does not mention the word 'sport' once. Why, then, has the ECtHR presided over so many sports-related cases? As articulated by Czepek, this may appear 'casuistic'<sup>1</sup>, given that the ECHR was not primarily designed to focus on the sports industry. However, this merely reflects the simple fact that sports-related issues and human rights issues overlap. Without specific derogation at times of 'emergency' under Article 15 ECHR, Convention rights apply in all areas, including sports governance. Even the UK, which has a sovereign Parliament, has enacted the Human Rights Act 1998 which requires legislation to be interpreted compatibly with the ECHR<sup>2</sup> when resolving all disputes, including sporting. Therefore, any assertion that sports-related disputes cannot be intertwined with human rights law falls flat on its face, and fundamentally disregards the universally pervasive nature of human rights issues.

Moreover, the question of whether 'sports participation' is a right or a privilege oversimplifies and reduces the role of sport in global society; the better angle from which to approach the question of evaluating the ECtHR's sports-related case law would be to recognise the crucial role that the sports industry plays in global society as an international employer which bears

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<sup>1</sup> Jakub Czepek, 'Sports in the Case-Law of the European Court of Human Rights' [2019] Espaço Jurídico Journal of Law [EJL].

<sup>2</sup> Human Rights Act 1998, s3

responsibility for the livelihoods and wellbeing of countless athletes. The question of whether 'sports employment' is a right or a privilege is uncontroversial; the Olympic Charter itself states that 'practice of sport is a human right' and that every individual is entitled to practice sport 'without discrimination of any kind.'<sup>3</sup> If this is breached, it follows that it must be investigated whether States are complying with their positive obligations to ensure safeguards against horizontal breaches of Convention rights.

Why, then, is the ECtHR's 'interference' often met with resistance and mistrust? I argue that this is due to the 'othering' of the ECtHR in the process of sports governance, which fails to conceptualise the ECtHR as itself being part of the sports governance process.

The word 'interference' in the statement itself is misleading, and contributes to the 'othering' of the ECtHR in the sports governance process, as it implies that an external body has exerted influence over an autonomous process. I argue that the ECtHR should instead be conceptualised as the top rung of the sports governance ladder. This conceptualisation is consistent with practical reality; the majority of sports disputes are resolved by arbitration, since sports governing bodies ('SGB') require athletes to enter agreements to rely on sports arbitration in lieu of judicial recourse for dispute resolution - however, where the arbitration process fails to respect Convention rights and domestic remedies have been exhausted, the ECtHR is rightfully the next and final step for applicants to enforce their Convention rights.

Regarding the ECtHR as a vital human rights adjudicator in the sports governance process is particularly appropriate because national legislatures and their judiciaries inadequately regulate the human rights obligations of SGBs. In deference to the perceived autonomous self-regulation of SGBs, many national legislatures have adopted a non-interventionist approach towards sports regulation, including the United Kingdom, France, and Germany<sup>4</sup>. This is problematic as it undermines the roles of legislatures, rendering them reactive instead of norm-creating. A prime example would be the UK's recent Football Governance Bill<sup>5</sup>, proposed only in response to widespread public outcry after the attempt to create a European Super League.

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<sup>3</sup> Olympic Charter 2023, Fundamental Principles of Olympism Number 4

<sup>4</sup> Mariusz Szatkowski, 'Analysis of the Sports Model in Selected Western European Countries' (2022) 22 *Journal of Physical Education and Sport*.

<sup>5</sup> Football Governance Bill 2024

National courts (and, as will be seen in Section II, the ECtHR) similarly self-constrain their efforts to regulate SGBs. Baldwin and Cave attribute the limited intervention of national courts to courts deeming themselves ‘ill-suited’ to assess decisions involving specialist knowledge<sup>6</sup>. This judicial reticence is problematic, because the perceived autonomous self-regulatory nature of SGBs is a fallacy in the context of human rights. As argued by Boyes, the expertise of SGBs is ‘overstated’ and does not extend beyond specialist knowledge of the sport itself, thereby necessitating ‘expertise in adjudication’ for issues going beyond the sport – such as human rights – which SGBs cannot provide<sup>7</sup>. Whilst Boyes’ argument does perhaps exaggerate the discreteness of sport and human rights issues (as will be explored in Section II, cases such as *Semenya v Switzerland*<sup>8</sup> straddle questions of both human rights issues as well as sporting fairness), it does underscore the reality that ordinary judicial courts – including national courts and the ECtHR – are far better equipped to deal with complex human rights issues than SGBs. In recognition of the deficit in human rights expertise in current SGBs and arbitration bodies, West explores whether a specialist Court of Arbitration for Sport and Human Rights ought to be created<sup>9</sup>; I argue that this need can better and more efficiently be fulfilled by simply recognising the ECtHR as a necessary component of the sports governance process which holds SGBs to their human rights obligations.

It is therefore clear that human rights is inextricably intertwined with – and therefore forms a part of – sports governance. It has been argued that the ECtHR is an indispensable part of this human rights aspects of sports governance. The case law will now be analysed in Section II to set out how the ECtHR’s performance of this role has been to the benefit of sports governance.

## **SECTION II:**

Arbitration is a process rooted in autonomy, which is inherently predicated on the consent of both parties. Therefore, in order to be truly effective, sports governance must serve and protect both SGBs and athletes.

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<sup>6</sup> R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 132

<sup>7</sup> Simon Boyes, ‘Sport in Court: Assessing Judicial Scrutiny of Sports Governing Bodies’ [2017] Public Law 363-381

<sup>8</sup> App no 10934/21 (ECHR, 11 July 2023)

<sup>9</sup> Daniel West, ‘Revitalising a Phantom Regime: The Adjudication of Human Rights Complaints in Sport’ (2019) 19 *The International Sports Law Journal* 2.

Recent case law has displayed increasing willingness from the ECtHR to safeguard human rights in sports governance.

The ECtHR sports-related case law, starting with the recent case of *Semenya vs Switzerland*<sup>10</sup>, will be evaluated to determine how successfully the ECtHR has performed its role in safeguarding human rights in sports governance.

A brief summary of the facts: The applicant Caster Semenya, an intersex female athlete, was required by 'DSD' regulations to take hormone treatment in order to be allowed to compete in the female category; she challenged these DSD regulations before Court of Arbitration for Sport (CAS) and the Swiss Federal Court (SFT), both of which rejected her appeals.

The ECtHR judgment: In the ECtHR, the applicant asserted – and the ECtHR agreed – that discrimination based on sex characteristics was sufficient to constitute discrimination as prohibited by Article 14. The applicant also asserted – and again, the ECtHR agreed – that she had been subjected to such discrimination and, further, that the Swiss government – by failing to provide sufficient institutional and procedural safeguards against discrimination – had caused her to suffer discrimination under Article 14 (taken with Article 8, her right to privacy) and constituted inadequate and ineffective domestic remedies, in breach of her right under Article 13 to an effective remedy (taken with Article 14). The ECtHR did not provide a separate ruling on the applicant's further claims of Article 3, 6 or 8 violations. The case has now been referred to the Grand Chamber.

I argue that the ECtHR did not interfere with competition rules or sporting regulations. *Semenya vs Switzerland*<sup>11</sup> is a case which straddles questions not only of human rights but also of sporting fairness, the latter of which is a question best answered by those with the relevant sporting expertise to determine the full ramifications of allowing the expansion of the 'female' sports category to include intersex athletes. Accordingly, the ECtHR did not attempt to prescribe changes to the DSD regulations, nor did its ruling provide a basis upon which Semenya can compete in sports again. It merely pointed out the significantly serious potential for harm to be inflicted by the DSD regulations, and found that the discrimination suffered by Semenya was not adequately examined. This is an example of effective sports

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<sup>10</sup> App no 10934/21 (ECHR, 11 July 2023)

<sup>11</sup> App no 10934/21 (ECHR, 11 July 2023)

governance by the ECtHR, which, having raised this human rights concern, left the implementation to the SGBs.

The ECtHR's scrutiny was particularly vital since under Swiss law, the ability of the SFT to set aside arbitral awards (such as the CAS award) was only possible in the extremely limited circumstances of showing procedural shortcomings or if Swiss public policy is violated<sup>12</sup>. Due to the Swiss courts' narrow interpretation of 'public policy', the SFT was unable to fully analyse CAS' assessment. Indeed, between 1989 to 2019, the SFT did not set aside any CAS Awards for 'public policy'<sup>13</sup>. This exemplifies the reticence of national courts towards reviewing arbitral awards, underscoring the need for the ECtHR's safeguarding of human rights.

Boyes explains that applying an overly restrictive judicial approach to reviewing sports arbitration is dangerous<sup>14</sup>; indeed, confidential arbitration resolves the majority of sports disputes, which results in a scarcity of case law from the ordinary courts to inform arbitrations. This undermines the consistency of arbitral outcomes pertaining to human rights. This is clearly detrimental to sports governance; unpredictable variability between outcomes is the antithesis of a fair governance process, which Bingham identifies as being a fundamental tenet of the rule of law<sup>15</sup>.

Collins argues that all 'club markets' (including SGBs) warrant minimal judicial intervention so as not to upset their delicate balance and constitutions.<sup>16</sup> However, case law contradicts the notion that the ECtHR needlessly undermines or upsets the balance of sports arbitral bodies. In *Mutu and Pechstein v Switzerland*<sup>17</sup>, the ECtHR concluded that the CAS was able to function compatibly with ECHR requirements. In *Ali Riza v Switzerland*<sup>18</sup>, the ECtHR held that there was no Article 6(1) ECHR violation when the CAS declared no jurisdiction to hear the applicant's

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<sup>12</sup> Swiss Private International Law Act, Article 190(2)

<sup>13</sup> Felix Dasser and Piotr Wójtowicz, 'Swiss International Arbitral Awards before the Federal Supreme Court Statistical Data 1989-2019' (2021) 39 ASA Bulletin 7 <[https://www.swissarbitration.org/wp-content/uploads/2021/05/Statistical-Data-on-Swiss-Arbitration-1989-2019-Dasser\\_Wojtowicz\\_749320\\_1-1.pdf](https://www.swissarbitration.org/wp-content/uploads/2021/05/Statistical-Data-on-Swiss-Arbitration-1989-2019-Dasser_Wojtowicz_749320_1-1.pdf)> accessed 4 March 2024.

<sup>14</sup> Simon Boyes, 'Sport in Court: Assessing Judicial Scrutiny of Sports Governing Bodies' [2017] Public Law 363-381

<sup>15</sup> Thomas Bingham, *The Rule of Law* (Penguin 2011)

<sup>16</sup> Hugh Collins, *Regulating Contracts* (1999) 218–222

<sup>17</sup> App no 40575/10 and 67474/10 (ECHR, 2 October 2018)

<sup>18</sup> App no 74989/11 (ECHR, 13 July 2021)

challenge to a Turkish Football Federation ('TFF') ruling. In *FNASS and others v France*<sup>19</sup>, the ECtHR found the Article 8 ECHR intrusion into the private lives of athletes (by requiring them to disclose their whereabouts) was justified by the public interest of enabling anti-doping tests to be conducted at unannounced times. As observed by Judge Serghides, in his partially dissenting opinion in the case of *Semenya vs Switzerland*<sup>20</sup>, it is not clear why the ECtHR failed to conduct a similar Article 8 analysis regarding the DSD regulations - which Holzer convincingly classifies as 'forced medical treatment'<sup>21</sup>. However, on any view, despite erring towards deference, the ECtHR is clearly able to differentiate between circumstances requiring its intervention and circumstances better left to specialist expertise. This underscores the role of the ECtHR in the sports governance process as an adjudicator of human rights issues.

Encouragingly, the ECtHR, in recent years, has indicated that it is more willing to provide more robust safeguarding of human rights in the context of sports disputes. For example, in *Mutu and Pechstein v Switzerland*<sup>22</sup> the ECtHR made clear that states could be held accountable for their courts' failure to scrutinise and reconcile CAS awards with the ECHR.

Likewise, in *Ali Riza and others v Turkey*<sup>23</sup>, the ECtHR found that TFF Arbitration Committee lacked independence and impartiality, thereby extending the *Mutu and Pechstein v Switzerland*<sup>24</sup> Article 6(1) ECHR guarantee for a fair trial from 'quasi judicial tribunals such as CAS' to 'domestic arbitration bodies without judicial supervision'<sup>25</sup>. In both cases, the ECtHR observed that athletes are often party to 'compulsory arbitration', not 'willing arbitration', since their livelihoods are dependent on their agreement to resort to arbitration. This augments the need for fair and impartial treatment of disputes by the arbitral bodies.

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<sup>19</sup> App 48151/11 and 77769/13 (ECHR, 18 January 2018)

<sup>20</sup> App no 10934/21 (ECHR, 11 July 2023)

<sup>21</sup> Lena Holzer, 'The European Court of Human Rights in the Caster Semenya Case: Opening a New Door for Protecting the Rights of Persons with Variations of Sex Characteristics and Human Rights in Sports' (*Opinio Juris* 4 August 2023) <<https://opiniojuris.org/2023/08/04/the-european-court-of-human-rights-in-the-caster-semenya-case-opening-a-new-door-for-protecting-the-rights-of-persons-with-variations-of-sex-characteristics-and-human-rights-in-sports/#:~:text=The%20ECtHR%20upheld%20several%20of>> accessed 28 February 2024.

<sup>22</sup> App no 40575/10 and 67474/10 (ECHR, 2 October 2018)

<sup>23</sup> App no 30226/10 and 4 others

<sup>24</sup> App no 40575/10 and 67474/10 (ECHR, 2 October 2018)

<sup>25</sup> Jernej Črnič, 'The Future of the Rule of Law in Sports Law: Ali Riza and Others v. Turkey' (*Strasbourg Observers* 18 March 2020) <<https://strasbourgobservers.com/2020/03/18/the-future-of-the-rule-of-law-in-sports-law-ali-riza-and-others-v-turkey/#:~:text=The%20rule%20of%20law%20is>> accessed 18 February 2024.

Ultimately, the explicit confirmation of fair trial guarantees provided by the ECtHR in these cases is beneficial for sports governance, which is a process designed to protect both parties.

## **CONCLUSION**

The ECtHR should, I argue, continue to strengthen human rights safeguards in sports governance. By doing so, it will not only uphold Convention rights, but it will signal to national legislatures and judiciaries that they must not shirk their duty to provide accountability and regulation of sports arbitration. This will enhance the effectiveness of the sports governance process as one which upholds the rights and interests of both parties.

I join Holzer<sup>26</sup> in hoping that in the wake of recent case law, human rights considerations will form a substantive part of sports governance.

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<sup>26</sup> Lena Holzer, 'The European Court of Human Rights in the Caster Semenya Case: Opening a New Door for Protecting the Rights of Persons with Variations of Sex Characteristics and Human Rights in Sports' (*Opinio Juris* 4 August 2023) <<https://opiniojuris.org/2023/08/04/the-european-court-of-human-rights-in-the-caster-semenya-case-opening-a-new-door-for-protecting-the-rights-of-persons-with-variations-of-sex-characteristics-and-human-rights-in-sports/#:~:text=The%20ECtHR%20upheld%20several%20of>> accessed 28 February 2024.